STRIKING WORDS OUT OF A WILL.

IF a will as executed by the testator fails to express his true intentions by reason of a mistake without any fraud, how far can any court receive evidence of the mistake and afford a remedy. There are a number of English cases in which a court of probate has afforded a remedy to a limited extent. In America there is but little authority on the subject.

The questions arising in this class of cases may be stated as follows:

I. Has a court of equity power, in any case, to correct a mistake in a will?

II. Has a court of probate power, in any case, to correct a mistake in a will?

If a court of probate has such a power:

A. Can it, in any case, add words to the will?

B. Can it, in any case, reject words found in the will as it stood when executed?

If it has power to reject words:

(1) For what sort of mistake can it exercise such a power?

(2) To what extent, assuming the mistake to be of a sort on which the court can act, can it exercise such a power:

(*a*) Where the rejection would not increase the amount of property passing under any part of the will?

(*b*) Where it would increase the amount passing under some part of the will?

I.

Courts of equity have no power to rectify or reform wills, on account of mistake, similar to that exercised by those courts in the case of deeds.[1] So-called reformation or correction of mistakes

[1] Polsey *v.* Newton, 199 Mass. 450, 85 N. E. 574 (1908); Nelson *v.* McDonald, 61 Hun (N. Y.) 406, 16 N. Y. Supp. 273 (1891); Sherwood *v.* Sherwood, 45 Wis. 357 (1878). See *In re* Bywater, 18 Ch. D. 17, 22 (1878). There are a couple of American cases which seem *contra*, but they are of doubtful import on this point,

in wills, without the aid of extrinsic evidence of intention, by disregarding or implying terms, is an entirely different process, being purely a matter of construction;[2] nor has a court of equity greater power in that respect than a court of law.

The reason usually given why equity will not reform a will is that the statute prescribing certain formalities for wills forbids the admission of extrinsic evidence of intention. The Statute of Frauds, however, has not prevented the reformation of deeds and contracts on account of mistake, although courts are not agreed upon the grounds and extent of such reformation.[3] Perhaps the requirement of attestation makes it more difficult to give effect to extrinsic evidence of intention, even by way of reformation in equity.

Another reason frequently given is that the beneficiaries under a will are volunteers, and equity will not interfere in favor of a volunteer.[4] How far this objection is conclusive may be doubted. It seems that voluntary deeds may be reformed in equity, as between volunteers claiming under them.[5] But it was formerly considered doubtful whether equity could reform a voluntary deed, even in favor of the donor.[6] And it is still sometimes said broadly in modern cases that equity will not reform any deed in favor of a volunteer.[7] Certainly there are few cases where it has been done, even as against another volunteer. Historically, at any rate, the lack of consideration has been a principal reason why equity has declined to interfere in the case of wills.[8]

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and both were uncontested: Wood *v.* White, 32 Me. 340 (1850) (disapproved in Sherwood *v.* Sherwood, 45 Wis. 357 (1878)), and Worrell *v.* Patten, 69 Ill. 254 (1873). It is suggested by the writer of a note in 21 HARV. L. REV. 434 that equity might afford a remedy in cases of mistake, but he cites no authority. See also Stephen, Digest of Evidence, preface to 3 ed., p. xxxviii.

[2] Story, Equity Jurisprudence, § 179.

[3] See Fry on Specific Performance, 5 ed., §§ 813 *et seq.*; Wigmore on Evidence, § 2417.

[4] Powell *v.* Mouchet, 6 Mad. 216 (1821); Engelthaler *v.* Engelthaler, 196 Ill. 230, 63 N. E. 669 (1902); Sherwood *v.* Sherwood, 45 Wis. 357 (1878); Wigram on Wills, ed. O'Hara, p. 266.

[5] Thompson *v.* Whitmore, 1 J. & H. 268 (1860); Newburgh *v.* Newburgh, 5 Mad. 364, 366 (1820); Lister *v.* Hodgson, L. R. 4 Eq. 30, 34 (1867); Adair *v.* McDonald, 42 Ga. 506 (1871).

[6] See remarks of Kekewich, J., in Bonhote *v.* Henderson, L. R. [1895] 1 Ch. 742 (1894).

[7] Shears *v.* Westover, 110 Mich. 505, 68 N. W. 266 (1896).

[8] Sometimes the objection is taken that the court cannot make the testator exe-

There is something to be said for always having a will proved as it stood when executed, and leaving a court of equity to deal with a mistake by making the beneficiaries who have profited thereby constructive trustees of what they have received.[9] But the law has not in fact proceeded in this way. The only instances in which any court has attempted to remedy mistakes in wills are those where a probate court has omitted particular words as not being part of the will, upon the theory stated below.

If words inserted by mistake are to be allowed to remain in the probate, and a remedy afforded by a court of equity, it seems that where words have been inserted by fraud the procedure should be the same. It is settled, however, that in the latter case the words should be omitted in the probate, and that if they are not so omitted, equity can afford no remedy.[10] It is true that in a case of fraud where justice cannot be done by omitting words from the probate, as when the fraud consisted in procuring the omission of words from the will, equity does afford a remedy by holding the legatees as constructive trustees. By analogy, there might be a remedy in equity in a case of mistake, supplemental to that in the probate court. But there is no authority for the interference of equity in any case of mistake only.[11]

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cute a new will (Rhodes *v.* Rhodes, 7 App. Cas. 192, 198 (1882), quoted below). But a court can reform a deed or contract as against the heirs or executors of a party, after his death. The fact, however, that in the case of transactions *inter vivos* the parties are usually alive when the occasion for reformation arises, while in the case of a will the testator is of course always deceased, tends, among other considerations, to show that the danger of admitting extrinsic evidence of mistake as a basis for reformation in equity would be much greater in the case of wills.

[9] See note in 21 HARV. L. REV. 434, above referred to. The jurisdiction of a court of equity to reform contracts is exercised upon broader grounds, and for more varied sorts of mistake (*e. g.*, a mistake of fact as to the subject of the instrument), than the jurisdiction of a probate court to correct wills. The suggestion apparently is that equity should afford a remedy for mistakes in wills on similarly broad grounds.

[10] Allen *v.* M'Pherson, 1 H. L. Cas. 191 (1847); Case of Broderick's Will, 21 Wall. (U. S.) 503, 512 (1874); Post *v.* Mason, 91 N. Y. 539, 550 (1883).

[11] But see a *dictum* in Whitlock *v.* Wardlaw, 7 Rich. Law (S. C.) 453, 458 (1854). There is not so strong a ground for the interference of equity in the case of a mistake where the only cause of the defeat of the testator's intention is his own failure to insert words which he intended to use, as there is in the case of a fraud, where the wrongful act of another person intervenes as the efficient cause of the omission and gives equity a hold upon the wrongdoer.

II.

Has a court of probate[12] power, in any case, to correct a mistake in a will?

The business of such a court is to determine what instrument, in just what words, constitutes the testator's will. It must therefore correct mistakes, if at all, by adding words to the will, or taking words from it.

A. Can it, in any case, add words to the will?

The law is clear that it cannot do so, no matter how evident it may be that words necessary to carry out the testator's intent have been omitted, and no matter what the cause of the omission. The court cannot make a will for the testator. Only such words as are contained in an instrument properly executed by him can be a part of his will. If a court of equity cannot reform his will by adding words to it, much less can a court of probate do so, which is a court of law, whose office is to determine what instrument, if any, the deceased executed as his will. It is immaterial whether words were omitted by mistake or on account of fraud.[13]

This proposition is frequently stated in the form of a rule of evidence. But it is not properly a rule as to the admissibility of evidence of the testator's intention; it is a substantive rule of law making it impossible to give effect to his intention, except as expressed in a properly executed instrument.[14]

B. Can a court of probate, in any case, reject words found in the will as it stood when executed?

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[12] By "court of probate" must be understood not only courts usually so designated, or having as a principal function the probate of wills, but any court which passes on the *factum* of a will, as the common-law and chancery courts regularly did, in the case of a will of real estate, in England until 1857, in many of our states until a more recent date, and even to-day to some extent in certain jurisdictions.

[13] A couple of English cases where words were inserted by a probate court have been expressly overruled. Goods of Schott, [1901] P. 190.

Professor Wigmore apparently thinks that the courts might have inserted words which were omitted by mistake. Wigmore, Evidence, § 2421, n. 1. He does not state his theory on this point, but it may be similar to that stated by him in discussing the reformation of contracts in writing, § 2417. Query, whether such a theory is applicable to instruments which are required to be attested?

[14] Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109, 117 (1866); Thayer, Preliminary Treatise on Evidence, 396, 397.

According to a number of English cases [15] it has power to do so, in certain instances, on the ground that such words were inserted by mistake. It is believed that in no reported American case has such a power been exercised; [16] but that, on the other hand, in no reported case has a state of facts similar to those on which the English courts have acted been squarely presented.[17] Can this practice of the English courts be justified in theory? The cases in which it has been established do not contain a full discussion of the grounds for it. Recourse must be had to the fundamental principles that should guide a probate court in dealing with a paper which has been shown to have been executed in the manner required for a will.

The leading case of Guardhouse *v.* Blackburn [18] lays down six rules, some of which it is desirable to consider in detail.

"*First.* That before a paper [duly] executed is entitled to probate, the court must be satisfied that the testator knew and approved of the contents at the time he signed it."

That the testator must "know and approve" the contents of the will is the old established phrase.[19] Nevertheless it needs considerable explanation. The real question is, are the words of the will the testator's words? He may make them his own without actually knowing what they are.

If the testator executes, without reading, a will which has been drawn up from his instructions, he does not in fact know its contents, in the sense of the words written in it as distinguished from their purport or effect. And it is with this sense of the term "contents" that we are here concerned.

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[15] Goods of Duane, 2 Sw. & Tr. 590 (1862); Goods of Oswald, L. R. 3 P. & D. 162 (1874); Morrell *v.* Morrell, L. R. 7 P. D. 68 (1882), and other cases cited below.

[16] In O'Connell *v.* Dow, 182 Mass. 541, 552, 554, 66 N. E. 788 (1903), and Sherwood *v.* Sherwood, 45 Wis. 357 (1878), there are *dicta* in favor of such a power.

[17] Why is it that cases involving points of law on the execution of wills are much rarer in this country than in England? Is it because cases in the probate courts are in most of our states not reported? Or because the practice of having an elaborate will drawn by an attorney from instructions, and executed without the testator's reading it, is more common in England?

[18] L. R. 1 P. & D. 109, 116 (1866).

[19] Barry *v.* Butlin, 2 Moo. P. C. 480 (1838); Hastilow *v.* Stobie, L. R. 1 P. & D. 64 (1865); Goods of Hunt, L. R. 3 P. & D. 250 (1875); Swett *v.* Boardman, 1 Mass. 257 (1804).

Courts have sometimes expressed themselves as if knowledge of the contents meant knowledge of the general purport of the will.[20] But it seems that the testator must either know or in some manner adopt the particular words written. It is with these words that a court of probate is concerned, and not with their meaning or legal effect. If a testator instructs his attorney to insert in his will a gift in certain terms, without leaving any discretion to the attorney, but the latter substitutes other words because he thinks they better carry out the testator's intentions, and the testator executes the will supposing that the gift has been written in terms as directed by him, the words used contrary to instructions are not a part of his will; and this is so without regard to the question whether the words used do in truth better express the testator's intentions, or what probably would have been his intentions if the matter had been explained to him.[21]

The intention of the testator as to how his property shall go is not, strictly speaking, the concern of a probate court.[22] Such a court cannot consider the legal effect of his words, or his belief as to their legal effect. Its only business is to determine the contents of his last will and testament, in the sense of the words contained in it.[23] It is, therefore, the contents of the will in that sense, *i. e.*, the words contained in it, that the testator must know and approve. Whether he does or does not know and approve of their legal effect is immaterial. But in what manner he must know and approve the words in order to make them his own is the question.

The testator, then, in the supposed case where he executes, without reading, a will drawn up in accordance with his instructions,

[20] *E. g.*, in Hastilow *v.* Stobie, L. R. 1 P. & D. 64 (1865), discussed below.

[21] See Farrelly *v.* Corrigan, [1899] A. C. 563, and Parker *v.* Felgate, L. R. 8 P. D. 171, 174 (1883).

[22] "It was not for them [the jury] to inquire into the meaning which he attached to particular clauses or provisions in it [the will] unless they should be of opinion that he had been misled or deceived." Charge to jury in Davis *v.* Davis, 123 Mass. 590, 597 (1878).

[23] Harter *v.* Harter, 3 P. & D. 11, 21 (1873); Rhodes *v.* Rhodes, 7 App. Cas. 192, 199 (1882); Garnett-Botfield *v.* Garnett-Botfield, [1901] P. 335. See also Hegarty's Appeal, 75 Pa. St. 503 (1874); Cox *v.* Cox, 101 Mo. 168, 13 S. W. 1055 (1890). In Burger *v.* Hill, 1 Bradf. Surr. (N. Y.) 360 (1850), a probate court undertook to remedy a mistake of law as to the scope of words in a will, by limiting the grant of probate, so that those words in the will should not take effect as to certain property. The decree, although affirmed in Hill *v.* Burger, 10 How. Pr. (N. Y.) 264 (1854), was unprecedented and unjustifiable.

adopts the contents as his will, and approves them as such, but he does not know them except constructively and by a fiction.

It seems, moreover, that it is not necessary that the testator should know even the general purport of his will, if he chooses to execute a testament that some one else has made for him "out of the whole cloth."

In Hastilow *v.* Stobie [24] the defendant pleaded that the deceased, at the time he signed the pretended will, did not know and approve the contents thereof. The plaintiff demurred to the plea, as bad in substance, on the ground that a will may be valid although the testator did not know and approve the contents thereof. Sir J. P. Wilde (afterwards Lord Penzance) held the plea good. He discussed the question whether, if a man chose to entrust the framing of his will entirely to another person, and executed it without at all knowing its contents, the will would be valid; and expressed the opinion that it would not, disapproving of the expressions of Sir C. Cresswell in favor of its validity in Middlehurst *v.* Johnson [25] and Cunliffe *v.* Cross.[26] For this his principal reasons were: first, that a will must of its nature be an expression of the testator's own volition; [27] second, that if such a will were good, it would be absurd to require that the testator have sufficient mental capacity to understand the disposition which he is making.

The first reason seems to resolve itself largely into a quibble on the double meaning of the word "will." [28] It is not necessary that a will should be the expression of the maker's volition in any different sense from that in which a deed must be so. If he deliberately executes an instrument which some one else has drawn up, that instrument is an expression of his volition. It is true that a testator

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[24] L. R. 1 P. & D. 64 (1865); s. c. 35 L. J. P. 18; 11 Jur. N. S. 1039; 14 W. R. 211.

[25] 30 L. J. P. 14 (1860).

[26] 3 Sw. & Tr. 37 (1863).

[27] Civil law authorities were cited in argument and relied on by the court, and also a passage from Swinburne on Wills, Part 1, § 3, par. 34. But an examination of Part 4, § 11, of the same work, where Swinburne repeats this statement (par. 11) among other rules as to validity of wills, is sufficient to show that he is here quoting directly from the civil law, and that the civil law is of little value as a guide to English testamentary law on such a point. The notion of one man's acting for another had only a limited currency in the Roman law. Sohm, Institutes of Roman Law, § 32 (Ledlie's translation, p. 145); Pollock, Contracts, 8 ed., p. 55; Dig. 28, 5, 32, pr.; Dig. 44, 7, 11.

[28] Justinian's Institutes likewise make a pun on "*testamentum*," as if it were derived from "*testatio mentis*." Inst. 2, 10, pr.; quoted by Sir J. P. Wilde, *supra*.

cannot execute his will by attorney.[29] The will, in that sense, must be his own act. But to delegate the choice of the words to be contained in the instrument is not the same thing as to delegate the function of executing it.[30] A will is often unquestionably good, though executed without the testator's having read it, or actually knowing one word which it contains, if drawn up by an attorney from the most general and informal instructions.[31] In such a case the testator does not actually know its contents. He may know its general purport, as distinguished from the language in which the attorney has embodied that purport. But why is even knowledge of that general purport essential?[32]

Just how much must the testator know about the contents of the will he signs? If he says to his attorney, "Tie up the property for my children," and the attorney, in a *bonâ fide* endeavor to carry out those instructions, draws a long document containing the most elaborate provisions, it is all his will.[33] Is there any difference except in degree when the testator says, "Draw up such a will as you consider suitable for me, and I will sign it"?[34]

As to the court's second reason, based on the requirement as to mental capacity, it is not true that the testator must, at the time of execution, have the mental capacity to understand all the provisions of his will. If he has sufficient capacity to know he is sign-

[29] This results from the express provisions of the Statute of Frauds, allowing only signature by a person acting in the testator's presence, who is rather a mere amanuensis than an attorney. It appears, indeed, to have been also the law in the ecclesiastical courts previous to the Wills Act.

[30] Previous to the Statute of Frauds a will of personalty might be made by an oral declaration, and it may have been good law that a testator could not empower another to make such a declaration for him. But where the testator signs a written instrument, there is a sufficient making of the will by the testator himself.

[31] *Cf.* Sheer *v.* Sheer, 159 Ill. 591, 596, 43 N. E. 334 (1893).

[32] See Williams on Executors, 10 ed., 254, note (*e*), preferring the view of Sir C. Cresswell to that of Sir J. P. Wilde.

[33] But *cf.* Bradford *v.* Blossom, 207 Mo. 177, 105 S. W. 289 (1907), where the instructions were wilfully exceeded.

[34] There seems to be no objection to a testator's making a part of his will by reference any existing document, whether or not he knows its contents. The document need not be one made by the testator. Lord Loughborough, in Habergham *v.* Vincent, 2 Ves. Jr. 204, 209 (1793); Jarman, 6 ed., 135. If he can do so, he can take a will prepared by another person, and by writing on it "This is my will," signing it, and having it witnessed, he makes a good will. There is no substantial difference between doing this and simply executing such a will.

ing a will drawn from his previous instructions, that is sufficient.[35] It is only necessary, as in the case of any other legal act, that the testator should be capable of understanding what it is that he is doing.[36]

The word "know," as used in the phrase under discussion, does not then, in itself, help much in determining exactly the necessary conditions for the validity of a will.

On the other hand, a person who actually knows the contents of a paper, and duly executes it, must usually approve its contents. Whether fraud or coercion, not involving the introduction of matter into the will without the testator's knowledge, is to be considered as negativing approval, seems to depend on whether they are treated as affording negative or affirmative defenses.

If the former view is taken, as in some states,[37] then these defenses may be held to negative the element of approval, which is thus treated as a necessary element in the proponent's case additional to that of knowledge. This was perhaps the view taken by the ecclesiastical courts, in which the phrase originated, so far as they paid any attention to such questions of pleading or of the separation of issues. In testamentary causes, at least, there was apparently no distinction made in those courts between affirmative and negative pleas or between different pleas in the same cause.[38] Likewise in issues at law as to the validity of wills of

[35] Parker *v.* Felgate, L. R. 8 P. D. 171 (1883); Perera *v.* Perera, [1901] A. C. 354, 361.

[36] The decision that the plea was good is sustainable on the ground that the words "know and approve" have an established technical meaning, which includes cases where the testator's knowledge of the contents is not actual but imputed. In Cleare *v.* Cleare, 1 P. & D. 655 (1869), Lord Penzance cites Hastilow *v.* Stobie as standing for the proposition that "if a man were to sign a paper of the contents of which he knew nothing, it would be no will." But does he know nothing of the contents when he knows it has been prepared by the attorney as he requested that it should be, *i. e.*, in accordance with what the attorney thinks proper? It may well be that the court would imply in such a request an instruction that the attorney should make the will such as he in good faith thought proper with regard to the testator's circumstances, and would find that the testator did not intend to adopt provisions inserted for the attorney's own benefit, or for reasons not connected with the testator's situation.

[37] Sheehan *v.* Kearney, 82 Miss. 688, 21 So. 41 (1896), and cases cited.

[38] Hastilow *v.* Stobie, L. R. 1 P. & D. 64, 66 (1865). The statement in Langdell, Equity Pleading, § 26, with regard to affirmative defenses in the ecclesiastical courts does not apply to the actual practice in the nineteenth century, at least in testamentary causes. It would be difficult to determine how far the loose state of the practice in testamentary causes, on this and other points, was due to the looseness of

real estate under the Statute of Frauds, any objection to the validity of a devise might be raised under the general issue.[39] It may be observed that according to this view the word "approve," in the phrase "know and approve," is used in an artificial sense, since in many cases of fraud there is approval in its ordinary sense.

If the defense is treated as affirmative, as in perhaps most states,[40] then the term "approval," in the definition of the requirements for the proponent's case, seems to be redundant, unless it is used to cover the cases where the words written are adopted without actual knowledge.[41] From this point of view a better phrasing of the requirement would be "knowledge *or* approval."

"*Secondly.* That except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents."

Undoubtedly this rule applies in the ordinary case. The important part is the exception. Must the suspicion be of fraud, or is any evidence tending to show that the testator did not know and approve the contents sufficient to raise the suspicion? Does the rule state anything more than a *primâ facie* presumption?

It seems to be generally admitted that if a testator sign a document whose contents are entirely different from what he supposes them to be, it cannot be probated, although he intended to execute his will. As where he signs a draft of some one else's will, supposing it to be his own.[42]

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pleading in all causes in those courts in modern times, and how far to the doctrine that all proceedings in testamentary causes were *in rem*, which prevailed among the Canonists. Bernardus Dorna, Summa Libellorum, § 25; Wahrmund, Quellen zur Geschichte des römisch-kanonischen Prozesses im Mittelalter, I, 27. (The writer is indebted to Professor Roscoe Pound for these citations.) The testamentary action in Roman law (*hereditatis petitio*) was *in rem*. Sohm, § 39 (Ledlie's translation, p. 186). This doctrine is mentioned by some English writers on ecclesiastical law. Law's Forms of Ecclesiastical Law, 2 ed., 180; Browne, Ecclesiastical Law, 2 ed., 427, 452.

[39] Hastilow *v.* Stobie, *ubi supra*. See also Guillamore *v.* O'Grady, 2 J. & L. 210 (1845); Trimlestown *v.* D'Alton, 1 Dow. & Cl. 85 (1827).

[40] *E. g.*, Baldwin *v.* Parker, 99 Mass. 79 (1868); and *semble*, now in England, see Hutley *v.* Grimstone, L. R. 5 P. D. 24 (1879), and note.

[41] See Morrell *v.* Morrell, L. R. 7 P. D. 68, 73 (1882).

[42] Goods of Hunt, L. R. 3 P. & D. 250 (1875); Estate of Meyer, [1908] P. 353; Goods of ——, 14 Jur. 402 (1850); Alter's Appeal, 67 Pa. 341 (1871); Nelson *v.*

The third, fourth, and fifth rules are not concerned directly with our question.[43]

"*Sixthly.* That the above rules apply equally to a portion of the will as to the whole."

Whether this is true of the first rule (that the testator must know the contents) is perhaps the crucial point of the present inquiry. Assuming that, if a man executes as his will a document whose contents are entirely different from what he supposes them to be, the document is not entitled to probate; can the court refuse probate to particular words in an instrument of whose nature and general purport, and of a part of whose contents, the testator was aware? Or must the court treat the instrument actually executed as indivisible, and hold that every word, or none, is a part of a legally constituted will?

In cases of fraud or undue influence, the courts have struck out part of a will. And this has been done where the fraud has consisted in causing the testator to execute a will containing words which he did not know were in it, *i. e.*, where the proponent has failed to prove his case under the first rule in Guardhouse *v.* Blackburn, so that the contestant has not had to prove fraud as a

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McDonald, 61 Hun (N. Y.) 406 (1890). See also Downhall *v.* Catesby, Moore 356 (1594); Goods of Fairburn, 4 Notes of Cas. 478 (1846); Couch *v.* Eastham, 27 W. Va. 796, 799, 805 (1886); Bradford *v.* Blossom, 207 Mo. 177, 105 S. W. 289 (1907). The mistake on account of which a will is refused probate must be of the same sort as that for which a clause may be omitted. See II, *B*, (1) below.

[43] These rules are as follows:

"Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as knew the contents thereof."

In the fifth rule, if "duly read over" means "read over in such a way that its contents are brought to the testator's notice," the court seems to state, in the form of a rule of evidence, the proposition that if a testator executes as his will an instrument whose contents he knows, it is immaterial whether or not he intends its legal effect.

defense.[44] In such cases the sixth rule has been applied to cases arising under the first.

Nor does there appear to be any solid objection to applying it where the testator's ignorance of a portion of the contents arises from mistake only. If the testator did not intend certain words written on the paper to be part of his will, because he did not know they were there, the law should not give effect to them as a part of his will. If, on the other hand, a man voluntarily puts into a document certain words, the law must give effect to them as they stand, without adding or subtracting anything on account of his extrinsic declarations. But the inquiry is always open whether he did intentionally use those words.[45] The statute requiring certain formalities for wills does not prevent the courts from declaring particular words in a formally executed instrument not to be a part of a testator's will, but only from declaring any words not contained in such an instrument to be a part of his will.

"The execution of what was shown to be the true will, and something more, may be treated as the execution of the true will alone." [46]

The objection to the admission of evidence of such a mistake is one of policy, grounded on the danger of abuse. Undoubtedly, there is a presumption in favor of the document as it stood when executed. The requirements of policy seem to be satisfied by treating it as a *primâ facie* presumption.

It is evident from the foregoing discussion that although a court of probate may have power to reject words which were in the will when it was executed, on the ground that such words were inserted by mistake, that power is restricted to cases where the mistake is of a certain kind.

(1) For what sort of mistake can it exercise such a power?

If a testator knows the contents of the paper executed by him, it is immaterial that he labors under a mistake as to matters that

[44] Fulton *v.* Andrew, L. R. 7 H. L. 448 (1875); O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788 (1903).

[45] Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109, 114 (1866). The knowledge of his attorney may be imputed to him in many instances, but that does not cover all cases where the testator is actually ignorant of the words used.

[46] Lord Blackburn, in Rhodes *v.* Rhodes, 7 App. Cas. 192, 198 (1882).

induce him to make such a disposition,[47] or that owing to a mistake as to the law, or as to the effect of his words, the document will fail to accomplish the result intended. It is only when he does not know the contents of the paper which he is executing that a mistake occurs which may be remediable.[48]

But when does he, in the eye of the law, know the contents? Very often, as is pointed out above, he is held to do so when in fact he does not know them at all. Where a testator has read a will so that he actually knows its contents, there is no room for the application of the doctrine in question. On the other hand, if a copyist by a clerical error inserts words which were not in the draft, and the testator neglects to read the paper before executing it, there is a clear case for rejection of the words. The testator does not know of their presence, nor has he adopted them.[49] The result should be the same if such a clerical error is committed by the testator himself, as, for instance, in writing out a will on a printed form which he executes without reading over.[50]

The difficult questions arise when a testator executes, without reading, a will that has been prepared by some one else from his instructions. Here the testator does not actually know the contents of the paper, but in most cases it is none the less his will that it fails, through some mistake, to carry out his intentions. He is held to know its contents, because he adopts his attorney's words as his own. The point then is, what sort of a mistake, on the part of the person actually responsible for the contents of the instrument, will justify the court in holding that the testator has not adopted the contents?

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[47] Unless a statute makes a particular sort of mistake a ground for avoiding the will. Georgia Code, 1911, § 3836.

[48] The cases of Goods of Gordon, [1892] P. 228, Goods of Reade, [1902] P. 75, and Goods of Snowden, 75 L. T. R. N. S. 279 (1896), in which the court omitted a mistaken reference to previous instruments, appear to be wrong, if the testator was in each case aware of the presence of the words which it was sought to omit; and there is nothing to show the contrary. Whether such a reference could be disregarded in construction is another question.

[49] In the following cases such errors of insertion were corrected by the court: Goods of Duane, 2 Sw. & Tr. 590 (1862); Vaughan *v.* Clerk, 87 L. T. R. N. S. 144 (1902). Perhaps this last was rather a case of substitution. Other cases of errors of substitution are mentioned later, *e. g.*, Goods of Bushell, L. R. 13 P. D. 7 (1887). And see Anonymous, Godb. 131, pl. 149 (1587).

[50] Goods of Moore, [1892] P. 378.

Probably a testator can, if he wishes to do so, adopt whatever words his attorney, or any person entrusted with the preparation of the will, may have written.[51] But usually a testator, in fact, only adopts the words written, upon the supposition that such person has carried out his instructions.[52] Here again, however, it is immaterial that, through a mistake as to the law or as to the effect of words, the will as drawn by the attorney fails to carry out the testator's intentions. The attorney, in a sense, has not carried out the instructions. But the attorney's mistake, made in the course of attempting, in good faith, to carry out the testator's instructions, is in effect the same as the testator's mistake. It makes no difference whether the testator is aware of the language of the will or not. The mistake is as much his own in the eye of the law, in one case as in the other.[53] Any other rule would permit too wide an inquiry into the correspondence of the legal effect of the will with the testator's intentions.

The most doubtful cases occur where the attorney deliberately employs words which fail to carry out the testator's intentions, not because of any mistake as to the effect of such words, but because he misunderstands the instructions, or is in error as to facts which he assumes.

In Brisco *v.* Hamilton [54] a testatrix instructed her attorney that certain land was to be devised in a certain way. The attorney, supposing that the testatrix owned only a half interest in that land, wrote a devise of a half interest; and the testatrix executed the will without reading it. She in fact owned the whole interest in the land. It was held that the testatrix did not adopt the attorney's words; and the words "undivided moiety of and in" were rejected.

In Morrell *v.* Morrell [55] the testator gave directions for a bequest to his nephews of his shares in the M. Company. The lawyer wrote a bequest of "the forty shares in the M. Company," and the testator executed the will without reading it. He had four hundred shares, all of which he intended his nephews to have. A jury

[51] Cunliffe *v.* Cross, 3 Sw. & Tr. 37 (1863); Hastilow *v.* Stobie, L. R. 1 P. & D. 64 (1865), *contra*, but see above.

[52] See the instructions to the jury and the verdict in Morrell *v.* Morrell, L. R. 7 P. D. 68 (1882).

[53] Rhodes *v.* Rhodes, 7 App. Cas. 192 (1882); Morrell *v.* Morrell, L. R. 7 P. D. 68, 71 (1882); Beamish *v.* Beamish, [1894] 1 Ir. 7.

[54] [1902] P. 234.

[55] L. R. 7 P. D. 68 (1882).

found that the mistake occurred in inserting the word "forty"; and "that he did not approve of the word being used, *i. e.*, that he instructed his solicitor as to the whole of the shares, and only approved of the draft on the supposition that the solicitor had carried out his wishes." The court directed the word "forty" to be struck out.[56]

In Goods of Oswald [57] the testatrix gave instructions for a testamentary instrument disposing of particular property. The attorney, apparently because he did not know that there was other property which had already been the subject of a previous will, drew up a will disposing of the particular property and containing the usual clause of revocation of all previous wills.[58] The testatrix executed the instrument, not knowing that it contained the clause of revocation. The court struck out that clause. Here the attorney misunderstood the instructions, or acted under a mistake as to the existence of a previous will.[59]

In these cases not only did the words fail to carry out the testator's real intentions, but they were not used by the attorney for that purpose, but for the purpose of carrying out what he mistakenly supposed the real intentions to be. The break in the machinery for carrying out the testator's intentions occurred between the testator and his attorney.

The distinction is illustrated by the case of Collins *v.* Elstone.[60] There a clause of revocation was inserted in a testamentary in-

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[56] It is not clear how the mistake arose here; it looks like a clerical error in writing "forty" for "four hundred," but the jury did not adopt that view. If it was due to a mistaken belief of the solicitor that the testator had only forty shares, the case is similar to Brisco *v.* Hamilton.

[57] L. R. 3 P. & D. 162 (1874).

[58] Or the clause of revocation may have crept in by a mere clerical error.

[59] In Goods of Fairburn, 4 Notes of Cas. 478 (1846), a *bonâ fide* misunderstanding of instructions affected the whole of the codicil rejected. In Hippesley *v.* Homer, T. & R. 48 n. (1822) (why did Lord Eldon say this case was not worth twopence? Sugden, Law of Property, 197), and Goods of Wray, Ir. R. 10 Eq. 266 (1876), parts of wills were rejected because not according to instructions, apparently on account of the attorney's misunderstanding or disregarding the instructions, without fraud. In Farrelly *v.* Corrigan, [1899] A. C. 563, there was either fraud or a wilful disregard of instructions, — it made no difference which. See Christman *v.* Roesch, 132 N. Y. App. Div. 22 (1909); Wait *v.* Frisbie, 45 Minn. 361, 47 N. W. 1069 (1891); Bradford *v.* Blossom, 207 Mo. 177, 105 S. W. 289 (1907); and *dictum* in Cowan *v.* Shaver, 197 Mo. 203, 213, 95 S. W. 200, 203 (1906), which seems, however, to be too broad.

[60] [1893] P. 1.

strument, which had the unintended effect of revoking a previous will. The testatrix, however, knew of the presence of the clause, and deliberately allowed it to remain, on account of a strange belief, on the part of the testatrix and the person who drew the instrument, that such words would not revoke the previous will. The court declined to reject the clause. It seems, moreover, that even if she had not read the instrument, the result would have been the same; for the person who drew it knew that she did not wish the previous will revoked, and inserted the words, not in order to work a revocation, but because he supposed them to be a necessary form.

(2) To what extent, assuming the mistake to be of a sort on which the court can act, can it exercise such a power?

This question may require to be treated somewhat differently accordingly as the rejection of the words would or would not increase the amount of property passing under the remaining words. Such a distinction is commonly taken, and must be considered. Is there, then, any objection to the exercise of the power in a proper case of mistake, —

(*a*) Where the rejection would not increase the amount of property passing under any part of the will?

Suppose that by a clerical error words are inserted constituting a residuary legacy.[61] There is no difficulty in omitting them, if the probate court has power in any case to reject words which were in the will when executed. The omission does not increase the amount passing under any part of the will, or alter in any way the effect of the remaining words.[62]

A case where the omission of certain words would not increase the amount passing under the will, yet would alter the meaning of the remaining words, is unlikely to occur. Suppose a gift of "one hundred dollars to each of my sons, not excepting A.," and no disposition of the residue. Evidence is introduced that the word "not" was inserted by a clerical error. Can the court strike out "not," so that the son will be deprived of his legacy? To do so would not increase the amount going to any one under the will,

[61] As in Goods of Duane, 2 Sw. & Tr. 590 (1862).

[62] *Cf.* Swinton *v.* Bailey, 4 App. Cas. 70 (1878), on the question of partial revocation by cancellation.

but it would entirely change the meaning of the "not excepting" clause. Such a case has never been discussed, but it is submitted that, for reasons which will be more fully considered below, it is not permissible to effect such a complete change in the meaning of the language of the will as it stood when executed.

(*b*) Where the rejection would increase the amount of property passing under some part of the will?

Words cannot be inserted, though omitted by a mere clerical error. And where the mistake really was in omitting words, the court will not reject words which were not inserted by mistake, for the purpose of making the will effect the result desired by the testator.[63]

But suppose the omission of particular words, which were inserted by mistake, would cause the will to give to a person property which it did not give before. For instance, the will when executed contained the words: "I give $500 to my son William and $100 to my son John." It appears in evidence that the draft of the will read: "I give $500 to my son John," and that the words "to my son William and $100" were inserted by the copyist by inadvertence (*e. g.*, while looking at the wrong line) and were never read by the testator.[64] Here the mistake is one of insertion, of the sort upon which the court can act; and the will with these words omitted perfectly carries out the testator's intention. Yet probably no court would allow the will to be probated as it stood in the draft, so as to give John $500.[65]

In Rhodes *v.* Rhodes [66] Lord Blackburn well states the difficulty:

"A much more difficult question arises where the rejection of words alters the sense of those which remain. For even though the court is convinced that the words were improperly introduced, so that if the instrument was inter vivos they would reform the instrument and order

[63] Harter *v.* Harter, L. R. 3 P. & D. 11, 21 (1873). See remarks on Newburgh *v.* Newburgh, 5 Mad. 364 (1820), in Sugden, Law of Property, 197. And *cf.* Stanley *v.* Stanley, 2 J. & H. 491 (1862).

[64] The hypothesis is borrowed from a supposed case discussed in Miles's Appeal, 68 Conn. 237 (1896), in connection with the question of partial revocation by cancellation.

[65] That is, no court would reject the words inserted, if the result would be to give John $500. It is suggested below that such is not necessarily the result, and that a court of probate may properly reject the words and grant probate in such a form as to prevent such a consequence.

[66] 7 App. Cas. 192, 198 (1882).

one in different words to be executed, it cannot make the dead man execute a new instrument; and there seems much difficulty in treating the will after its sense is thus altered as valid within the ninth section of the 7 Will. 4 & 1 Vict. c. 26, the signature at the end of the will required by that enactment having been attached to what bore quite a different meaning."

The difficulty seems to be as great under any statute. The court cannot put a gift into the will which was not in the will when executed, either by adding words or by rejecting them.[67]

Different views are possible, however, as to whether the rejection of words in certain cases puts something into the will which was not there when it was executed. To cut out a legacy will always increase some other legacy, by increasing the amount of the residue, if not otherwise; unless there is no gift of the residue, or the omitted legacy is itself a residuary gift. It seems, however, that the fact that the residue is increased is no objection to rejecting a legacy inserted by mistake. The meaning of a residuary gift is not changed by the revocation of a legacy. It is meant to carry, not any particular property, but whatever may, for any cause, be undisposed of at the testator's death.[68]

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[67] The question is similar to that which may arise when a testator revokes a portion of his will by cancellation. Suppose a testator bequeaths legacies to John and William in the form above suggested, and attempts to revoke the legacy to William, and increase that to John, by cancelling the same words that the court was asked to reject in the suggested case. All courts would probably refuse to allow the gift to John to be thus increased, and would refuse for the same reason, in substance, as in the case of words inserted by mistake, *i. e.*, because the will at the time of execution did not give a legacy of $500 to John. The two questions appear at first sight to be entirely different. In the case of insertion by mistake, the court is asked to reject the words because they never formed part of the testator's will; in the case of revocation, because the testator has revoked this portion of his will. One question depends on the statutory requirements for execution, the other on those for revocation. The same court might arrive at different conclusions in the two classes of cases. It might, for instance, rule that a statutory power of partial revocation by cancellation enables a testator to alter his will by striking out words, even to the extent of introducing entirely new gifts. It has been generally assumed, however, that a testator cannot, by an act of revocation, introduce a gift which was not in the will already. (Lord Penzance's *dicta* in Swinton *v.* Bailey, 4 App. Cas. 70, 82 (1878), are not necessarily at variance with such a rule.) And it is submitted that the two classes of cases should turn ultimately on the same question, — whether the disposition which the instrument will contain, after the rejection of the words in question, was contained in the will as it stood when executed.

[68] In Farrelly *v.* Corrigan, [1899] A. C. 563, it was assumed that the residue could be increased by the rejection of a legacy. In cases of partial revocation by cancellation,

There is, moreover, a large class of cases where the words inserted by mistake are, in effect, qualifications or limitations of a gift which is contained in the will as executed. Usually the removal of a qualification or limitation will enlarge the amount of property passing under the gift. Is the omission of such words proper?

Looking at the substance of the gift, the effect of the omission is to make the will pass something which it did not pass before, or pass it to a different person.[69]

But the English courts have not looked at the question in this way. In Rhodes *v.* Rhodes [70] Lord Blackburn states the test to be whether the rejection of the words inserted by mistake "alters the construction of the true part," and again, to be whether it "alters the sense of those which remain." This rule has been interpreted liberally by the English courts, which have rejected not only qualifications and limitations upon gifts, but words which might be more properly described as conditions, revocations, descriptions, or enumerations, and indeed almost every sort of adjective or adverb, or adjective or adverbial phrase.[71]

In the cases of Brisco *v.* Hamilton [72] and Morrell *v.* Morrell,[73] stated above, the court struck out the words "moiety of," and the word "forty," respectively, thereby much increasing the property

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the weight of authority, and of reasoning, allows revocation where the result is to increase a residuary gift. Barrow *v.* Barrow, 2 Lee Eccl. 335 (1756); Bigelow *v.* Gillott, 123 Mass. 102 (1877); Collard *v.* Collard, 67 Atl. 190 (N. J., 1907); *Re* Frothingham's Will, 76 N. J. Eq. 331, 74 Atl. 471 (1909); *Re* Kirkpatrick's Will, 22 N. J. Eq. 463 (1871); Jarman on Wills, 4 ed., 134. *Contra*, Miles's Appeal, 68 Conn. 237, 36 Atl. 39 (1896).

[69] *Cf.* the decisions of some courts in analogous cases of partial revocation by cancellation, declining to give effect to the cancellation wherever any other legacy is indirectly increased thereby. Eschbach *v.* Collins, 61 Md. 478 (1883); Pringle *v.* M'Pherson, 2 Brev. (S. C.) 279 (1809). This rule, strictly followed, would seem to forbid even an omission that increases a residuary gift. Miles's Appeal, 68 Conn. 237, 36 Atl. 39 (1896). See 24 HARV. L. REV. 558.

[70] 7 App. Cas. 192, 198 (1882).

[71] Indeed, no case has occurred in which the court has found itself unable to treat the words as a qualification or limitation; so that the question of what the court should do, where the rejection of words would cause the remaining words to undergo a change in grammatical construction or an entire alteration in meaning, has never come up. But see Anonymous, Godb. 131, pl. 149 (1587), where the court seems to have gone too far; and Downhall *v.* Catesby, Moore C. P. 356 (1594) where perhaps the minority opinion is preferable.

[72] [1902] P. 234.

[73] L. R. 7 P. D. 68 (1882).

passing by the legacies. In the former case the court speaks of the words rejected as a "limitation or restriction." In Vaughan *v.* Clerk[74] the court struck out the word "real" before "property," thus making the will pass personal as well as real property.[75]

In Goods of Oswald,[76] stated above, the court struck out a clause of revocation with the result of putting into operation all the provisions of a will which, as the words stood before the correction, was entirely revoked. The same thing has been done in other cases.[77] Yet what could be a clearer case where an omission of words operates to cause property to pass under a will, which property would not so pass if the words were allowed to remain? [78]

Is this practice of the English courts reconcilable with a due regard for the provisions of the Wills Act? It is submitted that it is; although there may often be difficulty in determining whether the meaning of the remaining words has been altered.

A probate court should look rather at the words of the will than at their ultimate effect, and therefore can properly reject words inserted by mistake, when the remaining words are not changed in meaning, although the result may be to make them carry a larger amount of property. Words are not to be treated as mere counters, and shifted about so as to take on a meaning entirely different from anything that can be found in the will as executed; but it is with words that the court is directly dealing, and if the grammatical construction is such that certain words can be regarded as qualifying or limiting certain others, the omission of qualifying or limiting words can be regarded as not adding anything to the will which was not in it when executed.[79]

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[74] 87 L. T. R. N. S. 144 (1892).

[75] In Stanley *v.* Stanley, 2 J. & H. 491 (1862), there is a *dictum* that it would be absurd to strike out the words "for life" in a devise to A. for life, in order to make the devise carry a fee simple. It seems, however, that an English court might reject such words at the present day, if a proper case were shown of insertion by mistake without the knowledge of the testator. The court in Stanley *v.* Stanley was not dealing with such a case.

[76] L. R. 3 P. & D. 162 (1878).

[77] Goods of Moore, [1892] P. 378; Goods of Wray, Ir. R. 10 Eq. 266 (1876). And see Hippesley *v.* Homer, T. & R. 48 n. (1804).

[78] Can the word "not" be struck out? Suppose a legacy "to my daughter if she shall not then be living with her mother." Can "not" be struck out, if inserted by mistake, so that the daughter, if living with her mother, will take? It seems that it cannot. The removal of the negative completely changes the meaning of the clause.

[79] A probate court cannot insert a legacy even though its omission is the result

It is submitted that the test laid down by Lord Blackburn is the true one in all cases, and it is immaterial whether or not the amount of property passing to any one under the will is increased by the rejection of the words in question. This test, therefore, should control even where there is no increase in the amount of any legacy, as in the case, above put, of the legacy "to each of my sons *not* excepting A."; the result being that the "not" cannot be omitted.

In some cases the mistake has been, not in the insertion of a word, but in the substitution of a wrong word for that which the testator intended to use. Such a case also raises a question whether the omission of the word used by mistake changes the meaning of the remaining words.

In Goods of Bushell [80] the draft of the will contained a legacy to the "Bristol Royal Infirmary," but by a clerical error, in the instrument finally executed, "British" was substituted for "Bristol." The court struck out "British" and inserted "Bristol." In inserting a word, it clearly exceeded its powers.[81] Could it properly strike out "British," leaving a legacy to the "Royal Infirmary"? The remaining words are not exactly what the testator intended to be in the will; the description is imperfect. But they are the testator's words, and the fact that a word has been omitted by mistake is no reason why the remainder of the will should not

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of fraud. There is no reason why it should be bound by less strict rules in a case of fraud than in a case of mistake, as to striking out words where the effect may be to enlarge the operation of the remaining words. Indeed, the court might well be more chary of exercising such a power in a case of fraud, because, if it declines to act, a court of equity may remedy the fraud. Yet it has not been suggested that a probate court has no power to strike out a particular part of a will for fraud, because the operation of the remaining words may be enlarged; and the power has been exercised in such a case. O'Connell *v.* Dow, 182 Mass. 541, 66 N. E. 788 (1903). A revocation procured by fraud should be struck out in the probate court. Allen *v.* M'Pherson, 1 H. L. Cas. 191 (1847).

Owing, perhaps, to the provisions of the Wills Act, and other statutes, doing away with revocation by cancellation, there are few cases on analogous questions with regard to revocation; but there is authority supporting the view that clauses may be thus revoked although the effect may be to enlarge the operation of the remaining words. Larkins *v.* Larkins, 3 B. & P. 16 (1802); Collard *v.* Collard, 67 Atl. 190 (N. J., 1907); Richardson *v.* Baird, 126 Ia. 408, 102 N. W. 128 (1905); Tomlinson's Estate, 133 Pa. St. 245, 251, 19 Atl. 482 (1890). (*Semble*, the last case goes too far in some points.) And see the opinion of Lord Penzance in Swinton *v.* Bailey, 4 App. Cas. 70, 82 (1878). The cases on revocation looking the other way have been cited above.

[80] L. R. 13 P. D. 7 (1887).

[81] Goods of Schott, [1901] P. 190.

be proved, or the word which is not the testator's allowed to remain in it. The meaning of the remaining words is the same, although that meaning is not now restricted by the additional adjective which has been rejected.[82] Very often, as in this case, the remaining words, though not as complete a description of the object as the testator intended,[83] are sufficient to identify the object.[84]

Words may be rejected even when the omission results in an evident gap.

In Goods of Boehm [85] the testator gave instructions for a legacy to each of his daughters, Florence and Georgiana. The attorney, by inadvertence, in writing out the will inserted the name of Georgiana in both bequests, so that Florence was given nothing. This error was not noticed by the attorney, nor by the testator, who did not read the will. The court rejected the word "Georgiana" where written the second time. Jeune, J., said:

"It may be that in the present case the effect of striking out the name in question will be, on the construction of the will, as it will then read, to carry out the testator's intentions completely. It is not for me to decide that. But even if to strike out a name inserted in error and leave

[82] Other cases in which words substituted by clerical error were rejected are: Goods of Schott, [1901] P. 190; Goods of Wrenn, [1908] 2 Ir. 370.

[83] No description is ever complete, in an absolute sense. See Wigmore, Evidence, § 2476, at beginning.

[84] The court required evidence that there was not a British Royal Infirmary; and apparently, if there had been, would have refused to admit evidence that would have the effect of giving the legacy to the Bristol Infirmary, presumably on the ground that to do so would be contrary to the rule against "disturbing a plain meaning." Here was a strange confusion of ideas. The court had no concern with rules of interpretation, such as the supposed rule against disturbing a plain meaning. Such rules only come into play when it has been determined what are the words which constitute the instrument. Guardhouse *v.* Blackburn, L. R. 1 P. & D. 109, 115 (1866). Supposing there were an inflexible rule against disturbing a plain meaning (as to which see Thayer, Preliminary Treatise, 447–470, Wigmore, Evidence, §§ 2462, 2476 (1)), the fact that a British Infirmary existed would be all the more reason for the court's exercising its power to strike out "British." For if a court of construction found on the face of the will a legacy to a British Infirmary which was an existing institution, it might not be able, under the supposed rule, to find that the Bristol Infirmary was meant. But if there were no British Infirmary, then it would make little practical difference whether or not "British" were struck out in the probate, because the court of construction could treat "British" as a mistake and give the legacy to the Bristol Infirmary. In truth the court had no concern with the existence of a "British" or a "Bristol" Infirmary, unless evidence on that point was offered as bearing on the question whether the alteration from the draft was a mistake or a deliberate change.

[85] [1891] P. 247.

a blank have not the effect of giving full effect to the testator's wishes, I do not see why we should not, so far as we can, though we may not completely, carry out his intentions."

The probate not merely omitted the word "Georgiana," but left a blank space where it had been, instead of letting the text run along consecutively as if nothing had ever been written there. This is the practice where the mistake has been one of substitution rather than of mere insertion.

In Goods of Cooper [86] the will, as it stood when executed, appointed Thomas Stevenson one of the trustees, "and the said Thomas Cooper," one of the executors. It was shown that "Cooper" was a draftsman's error for "Stevenson." The court granted probate of the will to Stevenson,[87] and struck out "Cooper" from the will, so that it read "Thomas ." [88]

The existence of such a blank space in a will, whether due to its never having been filled, or to its having been filled by mistake with a word not intended, is a circumstance which a court of construction can take into account, and to ascertain which it can refer, if necessary, to the original document.[89] And though the probate court would never allow a physical alteration of the document as executed,[90] there seems to be no objection to its making the probate correspond as nearly as possible to what the original would be if the rejected words were actually erased.

Although the point has not usually been referred to, it may fairly be said that in none of the decided cases has the rejection of words by the court altered the meaning of the remaining words. Suppose, however, it is impossible to strike out particular words and read the remaining words as they were intended to stand, because to do so would give the remaining words a meaning which they did not have in the will as it stood when executed. In this discussion it has hitherto been assumed that, in such a

[86] [1899] P. 193.

[87] The court could have done this without omitting the words in the probate. Goods of Shuttleworth, 1 Curt. Eccl. 911 (1838); Goods of Baskett, 78 L. T. R. N. S. 843 (1898).

[88] Another case in which a word was struck out and probate granted with a blank is Goods of Walkeley, 69 L. T. R. N. S. 419 (1893).

[89] Manning *v.* Purcell, 7 DeG. M. & G. 55, 24 L. J. Ch. 522, 523 n. (1855); *Re* Harrison, L. R. 30 Ch. D. 390 (1885).

[90] See Ffinch *v.* Combe, [1894] P. 191, 193.

case, the words cannot be omitted. But ought the court to decline to do anything?

Take, for instance, the case above supposed of a will reading: "I give $500 to my son William and $100 to my son John." The words "to my son William and $100" are proved to have been inserted by a clerical error. It may be assumed that the will cannot be amended so as to give John his $500. But should it be left so that William will get $500 by reason of the copyist's mistake? It seems that the way out of the dilemma is to reject the words, and leave blanks, so that the will reads: "I give $500 to my son John." Whether this constitutes a gift of $500 to John is a question of construction, though of a rather unusual sort, the question being what was the meaning of those words when the will was executed. On this, the fact that other words then stood in the blank spaces can be considered by the court.[91] If a court of construction decides, as it probably would, that there is no gift to John, the consequence is that neither William nor John will get anything.[92]

In theory the probate court ought not to concern itself with the effect of striking out words, but ought, in all cases, to reject words inserted by mistake and leave the will as thus corrected to a court of construction to interpret, only taking care to issue the probate in such a form, and have the facts as to the original state of the will so appear in the record, that the court of construction may have all proper materials.[93] That the result may be to render par-

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[91] *Cf.* Shea *v.* Boschetti, 18 Beav. 321; s. c. 18 Jur. 614 (1854); Gann *v.* Gregory, 3 DeG. M. & G. 777; s. c. 2 Eq. Rep. 605 (1854); Manning *v.* Purcell, 7 DeG. M. & G. 55; s. c. 24 L. J. Ch. 522 (1855); *Re* Wyatt, 4 T. L. R. 245.

[92] Puzzling cases will occur, such as the two legacies, above suggested, where the word "not" was introduced by mistake. Nevertheless it is submitted that the probate court ought never to let the words stand as they are, but should probate the will with a blank, and let a court of construction struggle with the resulting imperfect disposition. "To each of my sons excepting A." might be treated either as a gift to each son, coupled, as to A.'s gift, with a qualification which was void for uncertainty; or the gift to A. might be treated as invalid on account of the uncertainty of its terms. "To my daughter, if she shall then be living with her mother," might be treated either as a gift to the daughter free of condition, the condition being void for uncertainty; or as no gift at all, the uncertainty of the contingency invalidating the whole gift.

[93] This theory would result in removing all the questions under *B* (2), (*a*) and (*b*), as to the extent to which words can be rejected, out of the way of the probate court. In practice, where it is a case of mere insertion, not substitution, so that the will can be

ticular gifts invalid for uncertainty is no concern of the probate court. The court of construction must consider whether it can give effect to the remaining words, but it is relieved of the necessity of giving effect to the instrument as it stood with the words inserted by mistake.

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made to read just as the testator intended it should, and there is clearly no alteration in the meaning, no blank is left in the probate. If any question as to alteration in the meaning should arise, the original will and the record of the probate court can be referred to.